Supreme Court, U.S.
FILED
FEB 16 1993
OFFICE OF THE CLERK

No. 92-988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

KATHLEEN LEISHMAN-DONALDSON, WILLIAM J. DiGIOVANNI and JOHN A. BECKER, individually and in their Official Capacities as Bailiff and Deputy Bailiffs of the Shaker Heights Municipal Court,

Petitioners,

vs.

RONALD F. BALAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court review the decision of the court of appeals which held that the trial court was correct in denying the motion to dismiss or for summary judgment based on the record before it, and in holding that further development of the facts would be essential to determining what, if any, parts of the alleged conduct were entitled to absolute immunity?

2. Whether overriding considerations of public policy warrant the extension of absolute immunity to municipal court bailiffs who violate clearly established law and engage in a personally motivated campaign of tortious misconduct against a private citizen if the campaign is conducted under the auspices of a "court ordered" sentencing investigation, despite the fact that there is no "court order" and that the target of the investigation is not a defendant in any criminal action?

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Respondent Ronald F. Balas respectfully asks this Court to deny the petition for writ of certiorari for the reasons stated below.

STATEMENT

The statement of the case provided by the petitioners misstates and omits material facts which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Accordingly, a detailed statement of the facts as established in the record on appeal is appropriate and necessary to an understanding of the Sixth Circuit's decision.

For more than twenty years prior to the incidents complained of, plaintiff-respondent Ronald F. Balas ("Ron Balas" or "Balas") was actively involved on a daily basis with the counseling of youths who were "at risk" of becoming status offenders for truancy, delinquency, crime, alcohol and drug abuse (R. 39: Exhibit 3-A, Affidavit of Frederick J. Stauffer; Exhibit 3-C, Affidavit of Ronald F. Balas).

In 1979 Balas founded Kids in Crisis ("K.I.C."), a charitable non-profit organization dedicated to helping "at risk" youth. Balas worked at K.I.C. as a counselor continuously until 1990 when he was forced to resign (R. 39: Exhibit 3-C, Affidavit of Ronald F. Balas).

Petitioner Leishman ("Leishman") at all times relevant, was the chief bailiff of the Shaker Heights Municipal Court ("Shaker Court"). Leishman's husband, Judge Donaldson was at all times relevant the only judge of the Shaker Court.

Leishman first contacted Balas on December 8, 1989 when she telephoned K.I.C. and requested a meeting to discuss behavioral problems which her sister was experiencing with her 13 year old daughter (Leishman's niece). Later that day Balas and Dr. Iris Marshall, a co-worker at K.I.C., met with Leishman and Judge Donaldson to discuss Leishman's niece who was in institutional treatment for chemical dependency (R. 40: Exhibit 11-A. Affidavit of Ronald F. Balas;[1] R. 39: Exhibit 13-E, Affidavit of Iris Ann Marshall, Ph.D.). Leishman explained to Balas that she wanted to find alternative placement for her niece

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[1] R. 40: Plaintiff's Exhibits 11-A through 11-D were filed with the district court under seal, on plaintiff's motion, in order to protect the identity and privacy of the minor child.

because the insurance money had run out and the niece was due to be discharged. Balas agreed to help find alternative placement and to counsel Leishman's sister (R. 40: Exhibit 11-A, Affidavit of Ronald F. Balas). In apparent gratitude for Balas' help, Leishman told Balas in front of Judge Donaldson that "they would take care of the ticket"; referring to a speeding ticket which Balas had received from the Shaker Heights Police on November 28, 1989 and for which he had been summoned to appear in the Shaker Court on December 16, 1989 (R. 39: Exhibit 10-D, Affidavit of Ronald F. Balas).

Balas and Iris Marshall, Ph.D. counseled Leishman's sister on December 12, 19, and 29, 1989 and again on January 4, 1990 (R. 39: Exhibit 13-E, Affidavit of Iris Ann Marshall, Ph.D.).

From December 8, 1989 until at least January 4, 1990 Leishman and Judge Donaldson were very enthusiastic about Balas' efforts on behalf of Leishman's sister and niece. Leishman and Donaldson offered to help raise money for K.I.C. and Leishman gave Balas several Fraternal Order of Police "courtesy cards" in which she listed herself as "Chief Bailiff/Deputy Sheriff."[2]

On December 19, 1989 Ron Balas appeared as a character witness before the Shaker Court at the request of Joel Weiner, who was to be sentenced by Judge Donaldson on a guilty plea

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[2] *See*, R. 39: Exhibits: 10-A, Affidavit of Ronald F. Balas; 10-B, Letter of 12/28/89 from Leishman to Balas; 10-C, "Sample" solicitation letter prepared by Leishman; 10-E, Affidavit of Ronald F. Balas; and 10-F, F.O.P. cards issued to Balas by Leishman.

to a charge of driving a motor vehicle while intoxicated. At the time of the sentencing Judge Donaldson asked Ron Balas whether he would be willing to monitor Weiner and to provide him with some counseling regarding alcohol (R. 33: at pp. 24-25[3]). Balas agreed and told Judge Donaldson that either he or "one of our professionals can provide it at the agency" (*Id.*, at p. 25). Contrary to the petitioners insinuation that Judge Donaldson released Mr. Weiner into the custody of only Ron Balas, the sentencing transcript reveals that Judge Donaldson actually released Weiner "in the custody of Dr. Balas, Kids in Crisis, and/or his staff to monitor you" (*Id.*, at p. 28).[4] Subsequently, Weiner was referred by Balas to Dr. Rita Politzer, a licensed psychologist and Board member of K.I.C. for supervision of his probation (R. 41: Exhibit 20, Transcript of Proceedings on March 6, 1990, *City of Pepper Pike v. Joel A. Weiner*, Testimony of Dr. Rita Politzer, Tr. at pp. 32-38).[5]

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[3] The sentencing transcript in the case of *City of Pepper Pike v. Joel A. Weiner*, Shaker Heights Municipal Court Case No. 89 TRD 22904, is contained in R. 33 at pp. 19-30.

[4] It is noteworthy that the handwritten journal entry of the Shaker Court regarding Mr. Weiner's probation has had a portion of the notation scratched out so as to make it look like Balas was the only one responsible for Weiner's probation supervision. *See*, R. 39: Exhibit 16, Certified Copies of Journal Entries in the case of *City of Pepper Pike v. Joel A. Weiner*, Shaker Heights Municipal Court Case No. 89 TRD 22904.

[5] There is absolutely no evidence in the record to support the petitioners' assertion that "sentencing Weiner to seek counseling with Balas departed from Judge Donaldson's usual practice of sentencing convicted drunk drivers to Alcoholics Anonymous meetings." (Petition at p. 3). To the contrary, the only evidence in the record on appeal indicates that Judge Donaldson frequently referred convicted defendants to volunteer probation supervisors with no formal training. *See*, R. 39: Exhibit 18, Friends of the Court, published by the Shaker Court.

On January 2, 1990 Ron Balas telephoned the psychiatrist in the chemical dependency unit at the institution where Leishman's niece was a resident in order to discuss alternative placement for the child. During the conversation the psychiatrist informed Balas that the behavioral symptoms of Leishman's niece included sexual acting out and that the child's art therapy suggested sexual imposition (R. 40: Exhibit 11-A, Affidavit of Ronald F. Balas; *Accord.*, Exhibit 11-B, Affidavit of Orville Theodore McCormac).

On January 4, 1990 Balas counseled Leishman's sister and brought up the possibility, based on observations of her daughter's psychiatrist, that the child was a victim of sexual molestation (*R. 40:* Exhibit 11-A, Affidavit of Ronald F. Balas).

From this point forward Leishman's conduct toward Balas became increasingly bizarre and malicious; ultimately culminating in a full-fledged campaign of intimidation, retaliation, and retribution to defame and embarrass Balas and to ruin his reputation and standing among friends, associates, coworkers, colleagues, and employers.

Between January 9th and 19th, 1990, Leishman telephoned various professional associates of Balas. In one instance Leishman falsely insinuated to a licensed psychologist that Balas was forging his name on forms provided to insurance carriers for billing purposes (R. 39: Exhibit 13-C, Affidavit of Orville Theodore McCormac). In other instances Leishman telephoned persons associated with K.I.C. and others and informed them, *inter alia.*, that Balas was a fraud and was "practicing psychiatry without a license"; that Balas was "under investigation"; and that she would be seeking a grand jury indictment against Balas (*See*, R. 1: Amended Complaint, ¶¶ 22-25).

As a result of Leishman's verbal accusations against Balas, the Executive Board of K.I.C. determined that Balas should take a leave of absence pending resolution of her charges (*Id.*, Amended Complaint at ¶ 26).

On January 22, 1990 Balas retained attorney William K. Redmond ("Redmond") relative to the public accusations which Leishman was making against him (*Id.*, Amended Complaint at ¶ 27).

Based on information that Leishman held herself out as a deputy sheriff and regularly carried a firearm, Redmond made formal written inquiry on January 31, 1990 to various law enforcement agencies and certifying authorities concerning Leishman's law enforcement credentials, or lack thereof (*Id.*, Amended Complaint at ¶ 28).

Although not addressed in the opinions of either the district court or the court of appeals, the Amended Complaint (R. 1) and the record on appeal clearly establish a causal nexus between Redmond's representation of Balas and the severity of the retribution which Leishman ultimately exacted of Balas. In this regard the record on appeal clearly evidences the fact that Leishman became enormously concerned about the fact that Redmond was asking questions about her. As it turned out Leishman and Judge Donaldson had much to fear as they had a great deal to hide.

Leishman first contacted Redmond by telephone on February 6, 1990 and demanded to know why Redmond was asking questions about her and who he represented (R. 39: Exhibit 12-D, Affidavit of Attorney William K. Redmond). Leishman specifically wanted to know whether Redmond represented Squire Lovelace (*Id.*).

That Leishman was concerned that Redmond represented Squire Lovelace is significant. Squire Lovelace was a former employee of Aluminum Smelting & Refining Co. who was granted a disability by the State of Ohio, Bureau of Workers Compensation for an electrical shock injury which he received at work in June of 1989 (R. 40: Exhibit 11-C, Affidavit of Squire Lovelace). On December 20, 1989 Lovelace was confronted by Leishman in the lobby of his doctor's office. Leishman, wearing a pistol and a cap with police insignia told Lovelace that he would be going to jail (*Id.*). On December 29. 1989 Lovelace was called to the offices of Aluminum Smelting & Refining Co. where he was again confronted by Leishman. At this meeting Leishman introduced herself and stated that she had been with the police department for 12 years and that she now had her own detective agency (*Id.*). Leishman then showed Lovelace a video taped surveillance of him and told him that he had defrauded the company and that if it were up to her he would be going to jail. The President of the company then attempted to persuade Mr. Lovelace to sign some papers. The President, Mr. Barnett, told Lovelace that the company did not want to prosecute him for fraud and that they would pay him $1,000.00 if he would sign the paper. Lovelace refused (*Id.*).

As it turns out, Leishman did in fact own her own private investigation company, Search Concepts, Inc. Unfortunately, neither Leishman nor Search Concepts, Inc. was licensed by the State of Ohio to operate a private investigation company (*See*, R. 39: Exhibit 8-A, Certificate of Good Standing for Search Concepts, Inc., an Ohio corporation; Exhibit 8-B, Articles of Incorporation for Search Concepts, Inc.; Exhibit 9-B, Certified copy of 1990 financial disclosure statement of Judge Paul R. Donaldson ["Search Concepts, Inc. ... is my wife's wholly owned corporation out of which she does teaching and investigations."]; Exhibit 6-A, Division of Licensing certification

regarding Kathleen Leishman a.k.a. Kathleen Leishman-Donaldson; Exhibit 6-F, Division of Licensing certification regarding Search Concepts, Inc.). In Ohio it is illegal to engage in the business of private investigations unless the person or business is licensed.

More unfortunately, and quite obviously a great source of concern to Leishman was the fact that she was using Shaker Court employees on court time to conduct private investigations (*See*, R. 40: Exhibit 11-D, Affidavit of Nancy J. Johnston). Equally unfortunate is the fact that Judge Donaldson was receiving income from his wife's illegal private investigation business (*See*, R. 39: Exhibits 9-A and 9-B, certified copies of Judge Donaldson's financial disclosure statements for 1989 and 1990, respectively).[6]

Redmond's inquiries into Leishman's law enforcement credentials were an equal source of concern and aggravation to her since she had consistently misrepresented herself as a deputy sheriff despite the fact that she was not trained or

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[6] The Court can take judicial notice of the fact that on November 21, 1991, during the pendency of the appeal, Judge Donaldson and the petitioners were indicted by the Cuyahoga County Grand Jury on numerous counts of Theft in Office in connection with Leishman's private investigation business. *State of Ohio v. Kathleen Leishman-Donaldson, et al.*, Cuyahoga County Court of Common Pleas Case No. CR 274556. On October 15, 1992 in a plea agreement with prosecutors, Leishman plead guilty to five attempted theft counts, two attempted unauthorized access to computer services, and three violations of the private investigators statute. *State of Ohio v. Kathleen Leishman-Donaldson*, Case No. CR 274556. The Cuyahoga County Prosecutor dismissed all charges against Judge Donaldson on October 15, 1992. *State of Ohio v. Paul R. Donaldson*, Case No. CR 288632.

certified as a peace officer under Ohio law and the fact that she an never been on any Sheriff's Department payroll (*See*, R. 39: Exhibit 4, Excerpts from the deposition testimony of Kathy Leishman on June 5, 1987, *Mignon Donaldson v. Paul Donaldson*, Cuyahoga County Court of Common Pleas, Case No. 8715562, at pp. 22-23; Exhibit 10-E, Affidavit of Ronald F. Balas; Exhibit 10-F, F.O.P. cards distributed by Leishman; Exhibit 5-A , Letter from Warren H. Goodwin, Chief Deputy, Lake County Sheriff's Department; Exhibit 5-B, Letter from Reid W. Chave, Director of Certification and Standards, State of Ohio Peace Officer Training Council).

Whether motivated by a fear that Redmond would discover the fact that Leishman was running an illegal private investigation business out of a court of law or that she had misrepresented herself as a deputy sheriff for years, the record on appeal clearly establishes that Leishman and/or Judge Donaldson were enormously concerned about Redmond's inquiries. Between February 6th and February 9th, 1990 Leishman: personally contacted Redmond, attorney Tyrone Reed, and K.I.C. to determine who Redmond represented; had attorney Jane Wilson contact Redmond to determine who he represented; and had attorney Anthony O. Calabreese call other attorneys with whom Redmond was associated in order to "send a communication" to Redmond that attorney Wilson was prepared to be a witness against Redmond for interfering with Leishman's business (*See*, R. 39: Exhibit 12-A, Affidavit of Attorney Tyrone Reed; Exhibit 12-B, Affidavit of Attorney Howard E. Coburn; Exhibit 12-C, Affidavit of Attorney Linda L. Bluso; Exhibit 12-D, Affidavit of Attorney William K. Redmond).

On February 9, 1990 Leishman was informed that Redmond represented Ron Balas. Leishman immediately sought

to contact Balas on his telephone pager. When Balas returned the call to the Shaker Court, Leishman told Balas that "the judge" was going to hold him in contempt and to "bring his attorney" (R. 39: Exhibit 3-C, Affidavit of Ronald F. Balas; Exhibit 12-D; Affidavit of Attorney William K. Redmond).

On February 12, 1990 Leishman sent Ron Balas a certified letter on Shaker Court stationary threatening "legal action" unless her F.O.P. cards were immediately returned (R. 39: Exhibit 10-G, letter dated 2/12/90 from Leishman to Balas).

On February 20, 1990 Judge Donaldson re-opened the case of *City of Pepper Pike v. Joel A. Weiner,* Case No. 89 TRD 22904 for a reconsideration of sentence on March 6, 1990 at 11:00 a.m. The journal entry directed that a summons[7] be issued to Ron Balas and personally served by the Bailiff's office (R. 39: Exhibit 16, Certified Copy of Journal entries, *City of Pepper Pike v. Joel A. Weiner*).

Beginning on February 22, 1990 petitioners Leishman, William J. DiGiovanni, and John A. Becker (hereinafter collectively referred to as "the bailiffs") undertook a systematic campaign of serving criminal summons to virtually anyone they could find who had any sort of association with Balas and of telling prospective "witnesses" and others incredibly outrageous and malicious lies about Ron Balas.

Specifically, from at least February 22nd through March 5, 1990 the bailiffs served criminal summons upon various

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[7] Ohio R. Crim. P. 4 specifies that a warrant or summons be issued upon a complaint and a determination that there is probable cause to believe an offense has been committed.

friends, associates, colleagues, and co-workers of Balas which ordered these people to appear at the Shaker Court on March 6, 1990 at 11:00 a.m. **"to show cause why you should not be held in contempt of court for failing to obey an order of this court."** (*See*, R. 39: Exhibits 14-A through 14-J, Certified Copies of Summons issued by the bailiffs).

In her campaign against Balas, Leishman threatened various individuals who were perceived as being friendly and/or reluctant to testify against Balas (*See, e.g.*, R. 39: Exhibit 13-C, Affidavit of Orville Theodore McCormac; Exhibit 13-G, Affidavit of Mark W. Adamik; Exhibit 13-I, Affidavit of Raymond U. Wetzel; Exhibit 13-K, Affidavit of Helen Balas). In addition the bailiffs variously told recipients of the summons and others the following malicious lies about Balas: that this was "a case against Balas for misrepresenting himself as a psychiatrist (R. 39: Exhibit 13-A, Statement of Steven A. Fine; Exhibit 13-G, Affidavit of Mark W. Adamik); that Balas was wanted by the F.B.I. (R. 39: Exhibit 13-D, Affidavit of Laura DeRue; Exhibit 13-F, Affidavit of Shirley L. Wallace); that Balas had stolen $13,000.00 and had "gone underground"; that the police were looking for Balas; that Balas had misrepresented himself as a Doctor of Psychology; that Balas had killed a man while driving drunk; that Balas was running a Bingo game in Elyria, Ohio; that everything Balas had done had been under "false pretenses" and that Balas didn't have a black belt in karate (*Id.*).

On March 6, 1990 Ron Balas appeared with Redmond at the Shaker Court at which time a Notice of Special Appearance and a Motion to Specify the Charges was filed with the court (R. 39: Exhibit 15-A). Prior to the hearing all counsel were called into Judge Donaldson's chambers where he "converted" all the illegal summons issued by the bailiffs into subpoenas; admitted

that the summons which he ordered issued to Ron Balas was not based upon any complaint; and identified Balas as the "target" of the hearing (R. 39: Exhibit 15-B, Affidavit of Attorney James G. Corrigan).[8]

After the chambers conference the hearing went forward. The news media and various personal friends and associates of Balas had been invited to the hearing by Leishman and were in attendance. Leishman sat at the prosecutor's table.

Despite the fact that Judge Donaldson had identified Ron Balas as a "target" of the hearing, both in chambers and on the record, he excluded Balas from the court room and did not permit him to listen to any of the testimony which the prosecutor was attempting, with Leishman's assistance, to elicit against him. Redmond was not permitted to cross-examine any of the witnesses. All of the eight witnesses who were called were examined concerning their relationship to or knowledge of Ron Balas (*See*, R. 41: Transcript of Proceeding, *City of Pepper Pike v. Joel A. Weiner*, Shaker Heights Municipal Court, Case No. 89 TRD 22904).

After the hearing Leishman and/or Judge Donaldson gave a private interview to a reporter for the Cleveland Plain

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[8] Although the petitioners strenuously urge that the issuance of the "summonses were the result of a clerical error" (Petition at p. 5), the affidavits in the record on appeal suggest otherwise. Thus when Mark W. Adamik declined Leishman's invitation to voluntarily appear at the Shaker Court to testify against Balas, Leishman became very belligerent. When Adamik told Leishman that any further contact should be directed to his lawyer, Leishman told Adamik: "We'll come to your home with the police and serve a summons since you're being a prick about this." (R. 39: Exhibit 13-G, Affidavit of Mark W. Adamik. *Compare*, Exhibit 13-C, Affidavit of Orville Theodore McCormac; Exhibit 13-H, Affidavit of Barbara Adamik).

Dealer (R. 1: Amended Complaint, at ¶ 50). The following day an article appeared about Balas in the paper entitled: Judge Suspects Youth Counselor of Fraud (*See*, R. 33 newspaper article at p.165). Shortly after the hearing of March 6, 1990 K.I.C., the organization which Balas had founded, asked for his resignation. Members of the Kiwanas Club who had been invited to the hearing also asked for Balas' resignation from that organization (R. 1: Amended Complaint, ¶¶ 52-53).

On March 9, 1990 Leishman prepared a memorandum to Judge Donaldson which summarized all of the "evidence" which she had gathered on Ron Balas. In her memorandum Leishman manufactured false accounts of witness interviews. Thus, Leishman writes: "Balas tells people he is a psychologist and counselor routinely." (R. 33: Confidential Investigation at p. 5 [Leishman Memorandum at p. 3]). In support of this contention Leishman writes: "Judge Paul Donaldson and I spoke to Ms. Laraine Canzonetta who is the Administrative Assistant and Drug Coordinator for the Orange School System since 1971...**She said she was told by Balas that he was a Doctor of Psychology and she would appear at the hearing on 3/6/90 at 11:00 a.m. and testify.**" (*Id.* at p. 10 [Leishman Memorandum at p. 8]). (Emphasis supplied.)

Indeed, Ms. Canzonetta had already appeared at the March 6th hearing. However, in contradistinction to Leishman's assertions, Ms. Canzonetta testified under oath that she did not know anything about Ron Balas' counseling, training, or educational experience (R. 41: Testimony of Laraine Canzonetta, Tr. at p. 47). More significantly, Ms. Canzonetta has reviewed the referenced portion of Leishman's memorandum and in a sworn affidavit specifically disavows the assertion that Ron Balas ever told her that he was a "Doctor of Psychology" or that she ever communicated that to Leishman or Judge Donaldson (R. 39:

Exhibit 1-A, Affidavit of Laraine Canzonetta).

Similarly, Leishman wrote of her meeting with Shirley L. Wallace as follows: "On 3/5/90 at 11:30 a.m. Judge Paul R. Donaldson, Mary Jane Gambosi and I interviewed Shirley L. Wallace at the courthouse... **She knew him (Balas) as a ddoctor** ***(sic)*** **of psycology** ***(sic)***" (R. 33 at p. 15 [Leishman memorandum at p. 13]). (Emphasis supplied.)

Mrs. Wallace sworn affidavit regarding the meeting, however, directly contradicts Leishman's assertion (R. 39: Exhibit 13-F, Affidavit of Shirley L. Wallace). Like Ms. Canzonetta, Shirley Wallace has now reviewed the referenced section of Leishman's memorandum and like Ms. Canzonetta, she too explicitly repudiates the assertions contained therein (*Id.*, Exhibit 1-B, Affidavit of Shirley L. Wallace).

Notwithstanding the fact that Leishman was willing to manufacture false accounts of witness interviews in order to "prove" that Ron Balas was practicing "psychiatry" or "psychology" without a license, the fact remains that not one of the witnesses who testified before the Shaker Court on March 6, 1990 could support the proposition that Ron Balas had ever help himself out as either a "psychiatrist" or a "psychologist" (*See*, R. 41: Transcript of Proceeding, *City of Pepper Pike v. Joel A. Weiner*).

Nevertheless, Leishman persisted in her campaign of retribution against Balas. In this regard Leishman and Judge Donaldson, in clear violation of Ohio law, forwarded copies of her 308 page "Confidential Investigation" of Ron Balas to at least the following: the Ohio Attorney General, the Shaker Heights Prosecutor, the State of Ohio Counselor and Social Worker Board, and the Internal Revenue Service (*See*, R. 33,

Confidential Investigation at pp. 1, 2, 99).

On March 23, 1990 Judge Donaldson filed a complaint with the Shaker Heights Police Department charging Ron Balas with contempt and obstruction of official business (*Id.* at 307-308).

Subsequently, the City Council of Shaker Heights retained a special prosecutor to look into Judge Donaldson's charges. Sometime after May 16, 1990, the special prosecutor determined that there was no probable cause to prosecute Balas (R. 1: Amended Complaint at ¶ 57).

The case, *sub judice*, was commenced on February 21, 1991 in the Common Pleas Court of Cuyahoga County, Ohio. The Complaint sought damages against the bailiffs in their individual and official capacities. The City of Shaker Heights was also named as a defendant. Plaintiff-respondent's causes of action against the bailiffs were predicated exclusively on the following seven state law causes of action: Invasion of Privacy,[9] Abuse of Process, Malicious Prosecution, Defamation, Intentional Interference with Employment, Conspiracy, and Emotional Distress. On March 14, plaintiff filed an Amended Complaint with the Court of Common Pleas as a matter of right.

On April 3, 1991 all defendants joined in filing a notice of removal (R. 1) with the U.S. District Court. On April 5, 1991 all defendants joined in filing a brief in support of removal (R. 5). On April 29, 1991 plaintiff filed, *inter alia*, a motion to remand (R. 16), which was subsequently denied by the district

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[9] Plaintiff's claim for Invasion of Privacy was asserted against only Leishman.

court on August 16, 1991.

On appeal, plaintiff-respondent again raised the argument that invasion of a person's right to privacy, although cognizable under the law of the State of Ohio, is not a federally guaranteed right and cannot form the basis of a § 1983 action. In this regard, plaintiff-respondent challenged the subject matter jurisdiction of the district court charging that defendants had failed to meet their burden under *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1989) and that the district court had failed to properly address this threshold issue under the directives of *Siegert v. Gilley*, ___U.S.___, 111 S. Ct. 1789.

The Sixth Circuit Court of Appeals disagreed and held that the Amended Complaint "contains allegations sufficient to confer subject matter jurisdiction upon the district court." (Opinion at 8a.[10])

Although respondent believes the jurisdictional analysis of the court of appeals is flawed and that the removal of this case from the state court represents a cynical attempt to masquerade valid state law claims as a flawed § 1983 action in order to invoke the *Forsyth* doctrine for the sole purpose of impeding discovery and delaying trial, respondent has chosen not to raise the jurisdictional argument at this juncture.

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[10] The opinion of the Sixth Circuit Court of Appeals is reproduced as Appendix A to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. THE FACTUAL SITUATION PRESENTED IS SO IDIOSYNCRATIC AND ANOMALOUS THAT IT DOES NOT WARRANT REVIEW BY THE COURT

Illegal summons have been issued; witnesses have been menaced and intimidated; defamatory charges have been made public; reports of investigatory interviews have been manufactured; illegal searches have been threatened; a 308 page KGB style *dossier* has been compiled and distributed; a Star Chamber has been convened; and then charges were brought. This notwithstanding, the bailiffs of the Shaker Court opine that they are entitled, as a matter of law, to a blanket grant of absolute immunity to all acts attributed to them because they were on "official business": acting pursuant to a "court ordered" sentencing investigation of a person who was not a defendant in a case in which there was no "court order". *Indeed.*

Given the fact that this Court has historically conferred absolute immunity on officials only in extraordinary circumstances and has denied absolute immunity to: senior aids and advisors to the President of the United States; the Attorney General of the United States in performing national security functions, members of the President's cabinet; the Governor and Adjutant General of Ohio National Guard in military decision making, it is nothing less than arrogant in the extreme for the bailiffs of the Shaker Court to claim absolute immunity for their reign of petty tyranny.

Perhaps the most compelling reason for denying the writ is that the factual situation presented is so extraordinary and bizarre that it does not warrant the attention of this Court.

Although the record indicates that it was *de riguer* for the petitioners to usurp both police and prosecutorial functions in administering their own peculiar brand of justice, one can only hope that most courts in this country have not devolved to a point where the distinction between investigative, prosecutorial and judicial functions have become so hopelessly blurred.

Even if the Court were of the opinion that the extraordinary facts of this case warranted review, it would be premature for the Court to grant review when the case is far from over, the record is incomplete because no discovery has been allowed, and the implication of the ruling below is theoretical at best.

II. The Sixth Circuit's opinion is not in conflict with other circuit courts of appeals

Petitioners attempt to create a conflict between the Sixth Circuit's decision and the decisions of several other circuits in which probation officers have been granted absolute quasi-judicial immunity. This supposed conflict is contrived, not real. In contradistinction to the present case, the cases upon which petitioners rely were concerned with the limited function of gathering information for presentation to a court. More significantly, the cases upon which petitioners so heavily rely are distinguishable from the present case by virtue of the adequacy of procedural safeguards to prevent an abuse of power. Thus, in *Dorman v. Higgins*, 821 F. 2d 133 (2nd Cir. 1987) the Second Circuit Court of Appeals held that a federal probation officer was entitled to absolute immunity from a claim that he prepared a false presentence report on a criminal defendant, noting that: "We see little danger in according federal probation officers absolute immunity for this function, for the presentence report is subject to a number of procedural safeguards designed to protect the defendant's constitutional right not to be sentenced

on the basis of information that is materially false." *Id.* at 138. In this regard the court noted, *inter alia*, that the defendant and his counsel had to be given the opportunity to review the report and that the accuracy of the controverted part of the presentence report is subject to review on appeal. Similarly, in *Demoran v. Witt*, 781 F. 2d 155 (9th Cir. 1986) the Ninth Circuit Court of Appeals extended absolute immunity to cover a California probation officer with respect to a presentence report prepared pursuant to his statutory duty. The court reasoned that the extension of absolute immunity was justified because a "plethora of procedural safeguards surround the filing of a presentence report." *Id.* at 158. These safeguards included, *inter alia*, the fact that the report was made available to the defendant and his counsel at least nine days prior to hearing and that the report became a part of the record. *Id.*

In stark contrast to the cases in *Dorman* and *Demoran* there were no procedural safeguards in place to protect Ron Balas. Ron Balas had no right or opportunity to review the results of Leishman's "Confidential Investigation" or to challenge its findings; he had no right to adduce evidence or testimony in his defense; he was even denied an opportunity to sit at the hearing; and he had no right to an appeal. But again, Ron Balas was not a defendant in the proceeding before the Shaker Court.

It must be remembered that what is at issue in this case is not the limited function of gathering information about a convicted criminal defendant for presentation to a court to assist in the determination of an appropriate sentence. Rather this case is concerned with the creation and dissemination of false and defamatory information about a private citizen to the public and to the media outside of the courtroom. Even assuming that the bailiffs had some legitimate authority to conduct an investiga-

tion of Balas as a volunteer probation supervisor, the proper performance of that function does not entail the abuse of process, the manufacture and distribution of false "evidence" or gratuitous defamation.

III. The Sixth Circuit did not depart from established precedent and the opinion is consonant with the law

For purposes of determining immunity under federal law, this Court has repeatedly emphasized that the state officer who seeks absolute exemption from personal liability bears the burden of showing that such exemption is justified by "overriding considerations of public policy." *Forester v. White*, 484 U.S. 219, 224 (1988). Under established precedent the presumption is in favor of a standard of qualified immunity which "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In determining immunity questions under § 1983, this Court has traditionally made a "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). Officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue. *Hafer v. Melo*, ___U.S. ___, 112 S.Ct. 358, 363 (1991).

To determine whether public policy requires that the action of particular governmental officials be immune from suit, this Court has adopted a functional approach. In this regard the Court has identified three factors which must inform an immunity analysis, these being: 1) whether an historical or common law basis exists for granting an official absolute immunity from

suit for performing a particular function; 2) whether the proper performance of the function in question poses special risks of vexatious litigation; and 3) whether sufficient safeguards exist to prevent an abuse of power. *Mitchell v. Forsyth*, 472 U.S. 511, 521-23 (1985).

In applying these principals to the bailiffs' claimed entitlement of absolute immunity, the Sixth Circuit noted that "the touchstone for applicability of absolute judicial immunity is 'performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights.' " *Burns v. Reed*, 500 U.S. ___, ___, 111 S. Ct. 1934, 1946 (Scalia, J., concurring.) (Opinion at 10a.)

In accordance with this Court's decisions, the Sixth Circuit recognized that quasi-judicial immunity has been extended to hearing officers, administrative law judges, state prosecutors, and state parole officers. However, the Sixth Circuit noted that this Court "has taken pains to point out that immunity will only cloak functions performed by such officers which are judicial in nature" (Opinion at 11a, citing *Imbler*.)

In declining to extend absolute immunity to the activities of the bailiffs without further development of the factual record, the Sixth Circuit correctly held that an employment determination -whether someone should be employed or continued as a probation officer or equivalent- is not a judicial function and that court personnel who perform that function are not acting in a quasi-judicial capacity. (Opinion at 11a-12a.) Nevertheless, the Sixth Circuit did hold open the possibility that certain of the bailiffs' activities could be entitled to quasi-judicial immunity to the extent that they were investigating whether Weiner was complying with the terms of his probation at the direction of the judge. (Opinion at 12a.) The Sixth Circuit

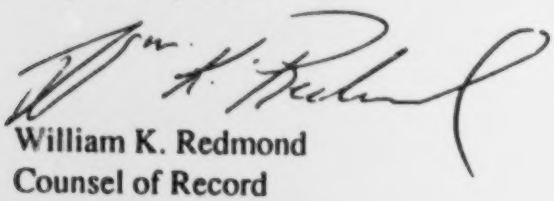
concluded that "the trial court was correct in denying the motion to dismiss or for summary judgment based on the record before it, and in holding that further development of the facts would be essential to determining what, if any, parts of the alleged acts were entitled to absolute immunity." (*Id.*)

The decision of the Sixth Circuit is sound and is consonant with the law. Given the fact that there is no journal entry in the *Weiner* case which authorized or sets forth the scope of the bailiffs' extraordinary inquisition, it is impossible, without the benefit of discovery, to determine what in fact was authorized by the judge let alone to draw the conclusion that the bailiffs' actions were *intra vires*. Clearly, there was no court order to issue phoney criminal summons because the petitioners have stated that the issuance of the summons were all clerical mistakes (Petition at p. 5). Were the bailiffs instructed to defame Balas, or merely to gather information? If in fact Judge Donaldson ordered the bailiffs to break the law, would they still be entitled to claim a derivative quasi-judicial immunity? The resolution of these questions and numerous others raised by this case is inappropriate in the abstract. Complete development of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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